Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

HARVARD
LAW REVIEW

VOL. XXIX FEBRUARY, 1916 NO. 4

HOURS OF LABOR AND REALISM IN CONSTITUTIONAL LAW*

THE Massachusetts Supreme Court was called upon recently to consider the constitutionality of the following statute:

"Employees in and about steam railroad stations in this Commonwealth designated as baggage men, laborers, crossing tenders and the like, shall not be employed for more than nine working hours in ten hours' time; the additional hour to be allowed as a lay off."

The increasing demand for shorter hours of labor throughout the industrial world, the likelihood that such demand will receive legislative recognition, the nation-wide importance of the attitude of the judiciary toward such legislation; conversely, the attitude of public opinion upon the continued exercise by the courts of their traditional power under the American constitutional system — all these considerations, and more, justify a constant critique within the profession of the point of view, no less than the explicit factors, which control judicial decisions upon social and industrial legislation.[1]

The question before the Massachusetts Supreme Court was not a new question. Necessarily, therefore, the court had to consider

* For laborious help in the preparation of this article I am indebted to one of my students, Mr. Howard F. Burns.

[1] Valuable contributions have been made in recent years which will be referred to later, particularly the admirable papers of Professor Ernst Freund, "Limitation of Hours of Labor and the Federal Supreme Court," 17 GREEN BAG 411; Judge Learned Hand, "Due Process of Law and the Eight Hour Day," 21 HARV. L. REV. 495; and Professor Roscoe Pound, "Liberty of Contract," 18 YALE L. J. 454.

the applicable precedents, and the legal thinking which was embodied therein.[2] What then was the legal background? It will be serviceable perhaps briefly to summarize the state of the authorities dealing with regulation of the hours of labor. Such a summary will tell a useful tale of legal history; it will do more — it may guide us not a little in the solution of present-day constitutional problems.

For the purpose of legal analysis, these cases fall into three groups:[3] (*a*) regulation of the labor of women and children; (*b*) regulation of labor in dangerous or peculiarly unhealthful employments; and (*c*) regulation of labor in industry generally.

(*a*) — Regulation of Labor of Women and Children

1876 Commonwealth v. *Hamilton Mfg. Co.*, 120 Mass. 383, sustained a law prohibiting the labor of women and children for more than sixty hours per week in manufacturing establishments. The statute was sustained as a matter of course. No reference whatever was made to the Fourteenth Amendment and counsel was apparently unable to "refer to any particular clause of the [Massachusetts] Constitution to which this provision is repugnant" (p. 384).

1895 Ritchie v. *People*, 155 Ill. 98,[4] invalidated an eight-hour law for women as "a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties" (p. 108).

---

[2] This paper will concern itself wholly with the validity of the regulation of hours of labor as a problem in what Mr. Justice Holmes calls the "apologetics of the police power." Therefore, objections to the specific statute under consideration because (1) it fails to make provision for emergencies, (2) it is a denial of the equal protection of the laws by reason of arbitrary classification, and (3) it interferes with a field taken over by Congress in the Hours of Service Act of March 4, 1907, or special arguments in its favor, based (*a*) on the power to amend corporate charters, and (*b*) on the fact that a special obligation may be imposed on public-service companies, are all put on one side.

[3] Cases involving the validity of legislation as to hours of labor upon public works or work done for the public are not considered. All recent important authorities now sustain such legislation, not as an exercise of the police power, but as an assertion by the state of its right to regulate the conditions under which public work shall be done. Atkin *v.* United States, 191 U. S. 207 (1903); People *v.* Crane, 214 N. Y. 154, 108 N. E. 427 (1915), affirmed, 239 U. S. 195 (1915); Heim *v.* McCall, 214 N. Y. 629, 108 N. E. 1095 (1915), affirmed, 239 U. S. 175 (1915).

[4] 40 N. E. 454.

1902 Wenham v. *State*, 65 Neb. 394,[5] sustained a sixty-hour per week law for women on the ground that "women and children have always, to a certain extent, been wards of the state"; and that while "the employer and the laborer are practically on an equal footing . . . these observations do not apply to women and children" (p. 405).

1902 State v. *Buchanan*, 29 Wash. 602,[6] sustained a ten-hour law for women in mechanical and mercantile establishments.

"It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. . . . While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. In the early history of the law, when employments were few and simple, the relative conditions of the citizen and the state were different, and many employments and uses which were then considered inalienable rights have since, from the very necessity of changed conditions, been subjected to legislative control, restriction, and restraint" (p. 610).

1907 People v. *Williams*, 189 N. Y. 131,[7] declared invalid a statute prohibiting night work of women because "it is, certainly, discriminative against female citizens, in denying to them equal rights with men in the same pursuit" (p. 135).

1907 Burcher v. *People*, 41 Colo. 495,[8] nullified an eight-hour law for women and children because (1) under the Colorado Constitution the legislature must specifically designate what pursuits are unhealthful; and (2) even if the court had power to pass on the issue "the laundry business must be considered healthful; for counsel themselves, in their stipulation of facts, on which the record shows the cause was decided, are in accord that such occupation is healthful" (p. 504).

1908 Muller v. *Oregon*, 208 U. S. 412, sustained the constitutionality of a ten-hour law for women in any mechanical establishment or factory or laundry.

"The legislation and opinions referred to . . . may not be, technically speaking, authorities, and in them is little or no discussion of the

[5] 91 N. W. 421.
[6] 70 Pac. 52.
[7] 81 N. E. 778.
[8] 93 Pac. 14.

constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil" (p. 420).

"The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all" (p. 422).

1910 Ritchie & Co. v. *Wayman*, 244 Ill. 509,[9] sustained a ten-hour law for women in any mechanical establishment, factory or laundry. A heroic effort is made to distinguish the first Ritchie case from the second Ritchie case. It is true that one was an eight-hour law and the other was a ten-hour law, but the two cases are, in fact, irreconcilable in their underlying point of view.

1914 Sturges v. *Beauchamp*, 231 U. S. 320, sustained the Illinois Child Labor Law as an exercise "of the protective power of government."

1914 Riley v. *Massachusetts*, 232 U. S. 671, sustained a Massachusetts fifty-four-hour per week statute.

1914 Hawley v. *Walker*, 232 U. S. 718, sustained an Ohio nine-hour statute.

1915 Miller v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385. In these two able opinions by Mr. Justice Hughes the United States Supreme Court sustained the extremest regulation of hours of labor to date — California statutes limiting the labor of women in certain pursuits to forty-eight hours per week.

"It is manifestly impossible to say that the mere fact that the statute of California provides for an eight-hour day, or a maximum of forty-eight hours a week, instead of ten hours a day or fifty-four hours a week, takes the case out of the domain of legislative discretion. This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme, but there is no ground for the conclusion here that the limit of the reasonable exertion of protective authority has been overstepped" (p. 382).

1915 People v. *Schweinler Press*, 214 N. Y. 395.[10] The Court of Appeals sustained a statute prohibiting night work for women and

[9] 91 N. E. 695.

[10] 108 N. E. 639.

with courageous frankness expressly overruled *People* v. *Williams*, *supra*.

"Impairment caused by exhaustion or even ordinary weariness must be repaired by normal and refreshing sleep and rest if health and efficiency are to be preserved" (p. 401).

" . . . surely it is a matter of vital importance to the state that the health of thousands of women working in factories should be protected and safeguarded from any drain which can reasonably be avoided. This is not only for their own sakes but, as is and ought to be constantly and legitimately emphasized, for the sake of the children whom a great majority of them will be called on to bear and who will almost inevitably display in their deficiencies the unfortunate inheritance conferred upon them by physically broken down mothers" (pp. 405–406).

(*b*) — Regulation of Labor in Dangerous Employments

1898 Holden v. *Hardy*, 169 U. S. 366,[11] sustained a Utah statute limiting to eight the hours of labor in underground mines. Familiar as this case is, a few sentences from the powerful opinion of Justice Brown will bear re-quoting:

"The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts" (p. 395).

"The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority" (p. 397).

"The question in each case is whether the legislature has adopted the

[11] It is worth while to note that Mr. Justice Brewer and Mr. Justice Peckham dissented.

statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class" (p. 398).

1899 In re Morgan, 26 Colo. 415.[12] The opinion of the United States Supreme Court in *Holden* v. *Hardy*, *supra*, was not convincing to the Supreme Court of Colorado and with sturdy independence that court nullified a similar eight-hour law as to underground mines.[13]

"The result of our deliberation, therefore, is that this act is an unwarrantable interference with, and infringes, the right of both the employer and employé in making contracts relating to a purely private business, in which no possible injury to the public can result" (p. 450).

1902 Re Ten Hour Law for Street Railway Corporations, 24 R. I. 603,[14] in an advisory opinion declared constitutional a ten-hour statute for employees operating street railways.

1904 Ex parte Boyce, 27 Nev. 299;[15] followed in *Ex parte Kair*, 28 Nev. 127; *ibid.*, 425 (1905);[16] and

1904 State v. *Cantwell*, 179 Mo. 245,[17] sustained an eight-hour law for underground mining work.

1911 Baltimore & Ohio R. R. v. *Interstate Commerce Commission*, 221 U. S. 612, sustained the constitutionality of the Hours of Service Act of March 4, 1907.

"The fundamental question here is whether a restriction upon the hours of labor of employés who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of em-

[12] 58 Pac. 1071.

[13] To avoid the grotesque clash between state courts and the Supreme Court as to the scope of constitutional protection of the same fundamental rights, a recommendation to leave the protection of such rights entirely to the Fourteenth Amendment, and therefore omit the corresponding provisions of the Bill of Rights in our state constitutions, has received the support of distinguished members of the profession and of statesmen like ex-President Taft and ex-Attorney-General Wickersham.

[14] 54 Atl. 602.

[15] 75 Pac. 1.

[16] 80 Pac. 463; 82 *id.*, 453.

[17] 78 S. W. 569.

ployés and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution" (pp. 618–619).

(*c*) — Regulation of Hours of Labor in General

1894 Low v. *Rees Printing Co.*, 41 Neb. 127,[18] declared unconstitutional an eight-hour day for mechanics and laborers, both because it was class legislation and violative of liberty of contract. After naïvely regarding it as irrelevant to consider the impulse back of such legislation,[19] the court nullified the statute as an attempt by the legislature to "prohibit harmless acts which do not concern the health, safety, and welfare of society" (p. 147).

1905 Lochner v. *New York*, 198 U. S. 45. In this well-known case the Supreme Court invalidated a ten-hour law for bakers. Speaking for the five majority judges, Mr. Justice Peckham declared that "to the common understanding the trade of a baker has never been regarded as an unhealthy one" (p. 59), and therefore

> "the act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual . . ." (p. 61).

The vigorous dissenting opinions of Harlan, White, Day, and Holmes, JJ., are familiar. But the following from the opinion of Mr. Justice Holmes pithily and completely puts the other point of view in the clash of ideas then before the Court:

---

[18] 59 N. W. 362.

[19] "For some reason, *not necessary to consider*, there has in modern times arisen a sentiment favorable to paternalism in matters of legislation" (p. 135, italics ours).

"I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work" (p. 76).[20]

1909 State v. *Miksicek*, 225 Mo. 561,[21] invalidated a six-days act — rest one day in seven — for bakers as an arbitrary infringement of liberty of contract.

1912 State v. *Lumber Co.*, 102 Miss. 802,[22] sustained a ten-hour law for labor employed in manufacturing. The court decided that the Lochner case did not control on the facts, and, significantly, relied on the dissenting opinions in that case for the statement of the governing principles.

"It would not be unreasonable for the legislature to decide that it would promote the health, peace, morals, and general welfare of all laborers engaged in the work of manufacturing or repairing if they were not permitted to extend their labor over ten hours a day, and the legislature could also decide that the best interests of the people in the state would be promoted by limiting the time of work of this numerous class of its citizenry to the time mentioned. In fact, when we consider the present manner of laboring, the use of machinery, the appliances, requiring intelligence and skill, and the general present day manner of life, which tends to nervousness, it seems to us quite reasonable, and in no way improper, to pass such law so limiting a day's labor" (p. 834).

On rehearing the decision was affirmed,[23] the court taking occasion to comment upon.

"the notable fact that it is rare for the seller of labor to appeal to the courts for the preservation of his inalienable rights to labor. This inestimable privilege is generally the object of the buyer's disinterested

[20] See the elaboration and application of this last thought in Mr. Justice Holmes's dissenting opinions in Adair *v.* United States, 208 U. S. 161, 190 (1908), and Coppage *v.* Kansas, 236 U. S. 1, 26–27 (1915).

[21] 125 S. W. 507.

[22] 59 So. 923.

[23] State *v.* Lumber Co., 103 Miss. 263, 60 So. 215 (1913).

solicitude. Some day, perhaps, the inalienable right to rest will be the subject of litigation . . ." [24] (103 Miss. 267–268).

1913 State v. *Barba*, 132 La. 768,[25] held unconstitutional an eight-hour law for stationary firemen, both because it constituted an arbitrary classification and impaired the liberty of contract.

1914 State v. *Bunting*, 71 Ore. 259,[26] sustained a ten-hour law for labor in factories. In this case the court again found the dissenting opinions of the Lochner case rather than the decision on the facts of that case the relevant authority.

"A certain minimum of physical well-being is necessary in order that social life may exist, the usefulness and intelligence of the citizens be increased, and the progress of civilization accelerated: Freund, Police Power, secs. 8, 10. . . . The required minimum of well-being varies in different periods, but rises with advancing civilization until it includes a certain standard of comfort. . . . It is an undeniable fact that prolonged and excessive physical labor is performed at the expense of the mental powers, and it requires no argument to show that a man who day in and day out labors more than 10 hours must not only deteriorate physically, but mentally. . . . In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. . . . It is urged . . . that if it is possible for the legislature to make the declaration that to work in a factory more than 10 hours in one day is injurious to the health, then that body can make four hours a day's work, and require two hours of the work to be performed before 8 o'clock A.M. It is sufficient to say that the question of four hours constituting a day's labor, or when any part of it shall be done, is not now before this court" (pp. 267, 272, 273).

1915 People v. *Klinck Packing Co.*, 214 N. Y. 121.[27] "The right to rest" — or rather the need for leisure — to which the Su-

[24] See a similar observation in Holden *v.* Hardy, 169 U. S. 369, 397, *supra:* "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, . . . his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class."

[25] 61 So. 784.

[26] Appeal now pending before the Supreme Court of the United States.

[27] 108 N. E. 278.

preme Court of Mississippi adverted in 1912, quickly received authoritative recognition from the New York Court of Appeals. In this case there was sustained a statute requiring one day of rest in seven. The proper sphere of legislative discretion and a correspondingly limited scope of judicial review are put most excellently by Judge Hiscock:

"Our only inquiry must be . . . whether it can fairly be believed that its [the statute's] natural consequences will be in the direction of betterment of public health and welfare, and, therefore, that it is one which the state for its protection and advantage may enact and enforce. It seems to me very clear that we may answer that it is such an one. . . . A constantly increasing study of industrial conditions I believe leads to the conviction that the health, happiness, intelligence and efficiency even of an adult man laboring in such employments [factory and mercantile] as those mentioned in this statute will be increased by a reasonable opportunity for rest, for outdoor life and recreation, for attention to his own affairs, and, if he will, study and education.

"Then we come to the question what is a reasonable opportunity, and within wide limits that problem is for the legislature. Anybody would probably say that one day in thirty or sixty would be too little and one day in each two days extravagant. Between these extremes none can safely assert that the mean adopted by the legislature of one day in seven is unreasonable" (pp. 127–128).[28]

A study of these opinions indicates a change not only in the decisions but in the groundwork of the decisions. We find a shift in the point of emphasis, a modification of the factors that seem relevant, a different statement of the issues involved, and a difference in the technique by which they are to be solved. The turning point comes in 1908 with *Muller* v. *Oregon*.[29] While lone voices of wisdom had been heard for almost two decades,[30] and the tendency was clearly in its direction, yet this case marks the culmination.

Prior to 1908 the decisions disclose certain marked common characteristics:

[28] Since the decision of the Massachusetts case under discussion the Supreme Court of Louisiana has again declared unconstitutional an eight-hour law for stationary firemen partly as unfair classification (because applying only to cities over 50,000) and partly as an impairment of liberty of contract. 77 So. (La.) 70 (1915).

[29] 208 U. S. 412, *supra*.

[30] See the dissenting opinion of Mr. Justice Holmes in Commonwealth *v.* Perry, 155 Mass. 117, 123 (1891); THAYER, LEGAL ESSAYS, 1; 26 GREEN BAG 511, 514.

(1) Despite disavowal that the policy of legislation is not the courts' concern, there is an unmistakable dread of the class of legislation under discussion.[31] Intense feeling against the policy of the legislation must inevitably have influenced the result in the decisions. In truth this presents the point of greatest stress in our constitutional system, for it requires minds of unusual intellectual disinterestedness, detachment, and imagination to escape from the too easy tendency to find lack of power where one is convinced of lack of wisdom.

(2) Legislation is sustained as part of the prevailing philosophy of individualism, as an exceptional protection to certain individuals as such, and not as a recognition of a general social interest. Thus legislation is supported either because women and children are wards of the state, are not *sui juris*, or to relieve certain needy individuals in the community from coercion.[32] The underlying assumption was, of course, that industry presented only contract relations between individuals. That industry is part of society, the relation of business to the community, was naturally enough lost sight of in the days of pioneer development and free land.[33]

(3) The courts here deal with statutes seeking to affect in a very concrete fashion the sternest actualities of modern life: the conduct of industry and the labor of human beings therein engaged. Yet the cases are decided, in. the main, on abstract issues, on tenacious theories of economic and political philosophy. There is lack of scientific method either in sustaining or attacking legislation. Legislation is sustained or attacked on vague humanitarianism, on pressure of immediate suffering, or "common understanding." This is not the fault of the courts. It was characteristic of our legislative processes, as well as of the judicial proceedings which

[31] "The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens, is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked to protest against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body." People *v.* Williams, 189 N. Y. 131, 135, 81 N. E. 778, 780 (1907).

"This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase." Lochner *v.* New York, 198 U. S. 45, 63 (1905).

[32] Holden *v.* Hardy, 169 U. S. 366, 397, *supra.*

[33] See the stimulating paper, "Labor, Capital and Business at Common Law," by Edward A. Adler, 29 HARV. L. REV. 241, particularly 262–274.

called them into question. It was true, substantially, of the social legislation of the nineteenth century.[34]

The courts decided these issues on *a priori* theories, on abstract assumptions, because scientific data were not available or at least had not been made available for the use of courts. But all this time scientific data had been accumulating. Organized observation, investigation, and experimentation produced facts, and science could at last speak with rational if tentative authority. There was a growing body of the world's experience and the validated opinions of those competent to have opinions. Instead of depending on *a priori* controversies raging around jejune catchwords like "individualism" and "collectivism," it became increasingly demonstrable what the effect of modern industry on human beings was and what the reasonable likelihood to society of the effects of fixing certain minimum standards of life.

The Muller case, in 1908, was the first case presented to our courts on the basis of authoritative data. For the first time the arguments and briefs breathed the air of reality. The response of the court on this method of presenting the case is significant.

"In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters. . . .[35]

[34] The earliest Factory Act was the "work of benevolent Tories." DICEY, LAW AND OPINION IN ENGLAND, 2 ed., p. 110, and Lecture VII, particularly pp. 220 *et seq.*, 228, 229; GOLDMARK, FATIGUE AND EFFICIENCY, ch. I.

[35] Muller *v.* Oregon, 208 U. S. 412, 419 (1907). The great mass of data contained in the brief is epitomized in the margin of the court's opinion. Miss Josephine Goldmark, Publication Secretary of National Consumers' League, collaborated with Mr. Brandeis in the preparation of this and subsequent briefs, which are now available in part II of Miss Goldmark's book, FATIGUE AND EFFICIENCY.

The present-day demand for scientific ascertainment of facts for legislation and administration is strikingly illustrated by Miss Lathrop in her Third Annual Report as Chief of the United States Children's Bureau (1915). "The whole field of child labor is thus far singularly barren of scientific study. . . . Full and intelligent protection of the physique and mental powers of the youthful workers in this country requires costly and laborious studies in laboratory and in workshop. . . . The Children's Bureau now desires to call attention to these studies and to submit the reasonableness of spending money to make them. It proposes a later presentation of carefully considered plans for which certain preparatory studies are now going forward. The more rapidly the restrictive child labor legislation becomes uniform,

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, *when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact*, a widespread and long continued belief concerning it is worthy of consideration." [36] (Italics ours.)

That upon such showing the Supreme Court should sustain the contested statute was inevitable. But the Muller case is "epoch making," not because of its decision, but because of the authoritative recognition by the Supreme Court that the way in which Mr. Brandeis presented the case — the support of legislation by an array of facts which established the *reasonableness* of the legislative action, however it may be with its wisdom — laid down a new technique for counsel charged with the responsibility of arguing such constitutional questions, and an obligation upon courts to insist upon such method of argument before deciding the issue, surely, at least, before deciding the issue adversely to the legislature. For there can be no denial that the technique of the brief in the Muller case has established itself through a series of decisions within the last few years, which have caused not only change in decisions, but the much more vital change of method of approach to constitutional questions.[37]

The most striking illustration is the attitude of the New York

the more evident must be the need of studying the welfare of the young worker within the occupation, so that we may secure just standards for the use of labor, as new standards for material are being developed." (pp. 23, 24.)

[36] Muller *v.* Oregon, 208 U. S. 420–421.

[37] See briefs in Ritchie & Co. *v.* Wayman, 244 Ill. 509, 91 N. E. 695 (1910); Hawley *v.* Walker, 232 U. S. 718 (1914); Miller *v.* Wilson, 236 U. S. 373 (1915); Bosley *v.* McLaughlin, 236 U. S. 385 (1915); Stettler *v.* O'Hara, 69 Ore. 519, 139 Pac. 743 (1914) (and brief in the same case now pending before the Supreme Court of the United States); People *v.* Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915).

Court of Appeals in *People* v. *Schweinler Press*.[38] In that case, it will be recalled, the court courageously overruled *People* v. *Williams*, *supra*, [39] and sustained a statute prohibiting night work for women. We find a careful ascertainment of facts by the legislature as the basis of its action, and thereafter a careful presentation of facts before the court to support the legislative reason. Not only was there a presentation of facts in 1915 such as counsel failed to make in 1907, but there was a presentation of new facts acquired since 1907. If the point of view laid down in this case be sedulously observed in the argument and disposition of constitutional cases, it is safe to say that no statute which has any claim to life will be stricken down by the courts.

"While theoretically we may have been able to take judicial notice of some of the facts and of some of the legislation now called to our attention as sustaining the belief and opinion that night work in factories is widely and substantially injurious to the health of women, actually very few of these facts were called to our attention, and the argument to uphold the law on that ground was brief and inconsequential.[40]

"There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission." [41]

These recent cases, dealing with regulation of the hours of labor, do not stand apart but illustrate two dominant tendencies in current constitutional decisions:

(1) Courts, with increasing measure, deal with legislation affecting industry in the light of a realistic study of the industrial conditions affected.[42]

---

[38] 214 N. Y. 395, 108 N. E. 639 (1915).

[39] 189 N. Y. 131, 81 N. E. 778 (1907).

[40] People *v.* Schweinler Press, 214 N. Y. 395, 411, 108 N. E. 639, 643 (1915).

[41] *Ibid.*, 214 N. Y. 395, 412–413, 108 N. E. 639, 644 (1915).

[42] McLean *v.* Arkansas, 211 U. S. 539, 549–550 (1908) (it is significant that Mr. Justice Brewer and Mr. Justice Peckham dissented); Baltimore & Ohio R. R. *v.* Interstate Commerce Commission, 221 U. S. 612, 619 (1911).

(2) The emphasis is shifted to community interests, the affirmative enhancement of the human values of the whole community — not merely society conceived of as independent individuals dealing at arms' length with one another, in which legislation may only seek to protect individuals under disabilities, or prevent individual aggression in the interest of a countervailing individual freedom.[43]

As a result we find that recent decisions have modified the basis on which legislation limiting the hours of labor is supported. As science has demonstrated that there is no sharp difference in kind as to the effect of labor on men and women, courts recently have followed the guidance of science and refused to be controlled by outworn ignorance. And so we find the Supreme Court of Oregon, in sustaining the ten-hour law for men, observing that "legislative regulation of the hours of labor of men and that of women differ only in the degree of necessity therefor." [44] True enough, we are not out of the woods of difficulty by saying the question is a matter of difference of degree. But once that is recognized, once we cease to look upon the regulation of women in industry as exceptional, as the law's graciousness to a disabled class, and shift the emphasis from the fact that they are *women* to the fact that it is *industry* and the relation of industry to the community which is regulated, the whole problem is seen from a totally different aspect. Once admit it is a question of degree, there follows the recognition — and the conscious recognition is important — that we are balancing interests, that we are exercising judgment, and that the exercise of this judgment, unless so clear as to be undebatable, is solely for the legislature.[45]

What, then, are the common factors in the labor of men and women that would make a limitation of the hours of labor, in employments not dangerous or inherently unhealthy, to ten hours or nine hours an exercise of legislative discretion not beyond the pale of reasonable argument, and therefore to be respected by the courts? They are:

(1) "The common physiological phenomenon, fatigue," and the

---

[43] People *v.* Klinck Packing Co., 214 N. Y. 121, 128, 108 N. E. 278, 280 (1915).

[44] State *v.* Bunting, 71 Ore. 259, 271, 139 Pac. 731, 735 (1914).

[45] Price *v.* Illinois, 238 U. S. 446, 452 (1915).

need of rest to repair the waste of the toxin.[46] Can the point where the line is to be drawn possibly be drawn *a priori?* Or, at the least, in the light of modern physiology is any layman entitled to say that a limitation of routine manual labor of masses of men to nine hours is a capricious and wilful oppression, without sustaining reason? [47]

(2) An enlarged conception of leisure and the tendency to regard not only its relation to the immediate effects upon animal health but also its bearing on the industrial output and the demands of citizenship.[48]

(3) Experience, based upon adequate trial, with the gradual reduction of labor and the slow increase of hours of leisure encouragingly demonstrates that such limitation of labor and increase of leisure have been put to fruitful uses. The tried measures of curtailing manual labor have added to the sum total of that by which we measure the civilized aspects of life.[49]

This then was the "state of the art" which confronted the Massachusetts Supreme Court in passing upon the constitutionality of the nine-hour law in question. One would suppose that in the light of all this it would be an easy matter for the court to hold that a nine-hour day is not "so extravagant and unreasonable, so disconnected with the probable promotion of health and welfare that its enactment is beyond the jurisdiction of the legislature," [50] or, at the very least, that, since the subject is "debatable, the legislature is entitled to its own judgment." [51]

Quite the contrary. The court held that the statute "is an unwarrantable interference with individual liberty and an interference with property rights, and therefore contrary to constitutions which secure these fundamental rights." [52]

How could such a result have been reached?

[46] See GOLDMARK, FATIGUE AND EFFICIENCY, ch. 2. The scientific views set forth in Miss Goldmark's book recently formed the basis of an arbitration judgment, in Australia, by Mr. Justice Higgins, in the Waterside Workers' case (not yet reported).

[47] Price *v.* Illinois, 238 U. S. 446, 452 (1915), *supra.*

[48] See *e.g.* HOBSON, WORK AND WEALTH, particularly chapters XIV and XV; TAUSSIG, INVENTORS AND MONEY MAKERS, pp. 63, 65 *et seq.*, 71 *et seq;* U. S. Commissioner of Labor Statistics Royal Meeker, 63 Annals Amer. Acad. of Pol. and Soc. Sci., 262, 267.

[49] See GOLDMARK, FATIGUE AND EFFICIENCY, p. 279.

[50] People *v.* Klinck Packing Co., 214 N. Y. 121, 127, 108 N. E. 278, 280 (1915).

[51] Price *v.* Illinois, 238 U. S. 446, 452 (1915).

[52] Commonwealth *v.* Boston & M. R. R., 110 N. E. (Mass.) 264 (1915).

(1) The case was inadequately presented. The court was not called upon to pass on the validity of the statute as such, but upon an agreed statement of facts under the statute to the effect that there is nothing inherently unhealthy about the work which the employee did, as it was half performed in the open air and was not arduous.[53] The assumption back of such a statement is that where work is not inherently unhealthy it is immaterial how long such work is pursued. Thus a wholly unscientific concession of fact was made, and therefore a wholly unscientific issue was presented to the court. But even such an issue was not supported by the available body of scientific facts. No attempt was made to bring to the attention of the court a detailed, painstaking, thoroughly marshaled array of facts to explain and to fortify the experience and theory back of labor legislation. In other words, the case was not argued in the way in which the decisions in the Muller case, the second Ritchie case, the Hawley case, the Miller case, the Bosley case, and the Schweinler case demanded that it should be argued.

(2) One can therefore understand why the court found the case "governed" by the Lochner case, *supra*.[54] Nevertheless, one is compelled to conclude that the illumination that has been cast upon the Lochner case during the past decade does not leave to that case any principle which *ipso facto* controls the validity of specific measures regulating hours of labor. The principle of the Lochner case is simple enough: that arbitrary restriction of men's activities, unrelated in reason to the "public welfare," offends the Fourteenth Amendment. As to the principle, there is no dispute. But the principle is the beginning and not the end of the inquiry. The field of contention is in its application. The Lochner case, judged by its history and by more recent decisions of the Supreme Court, does not in itself furnish the yardstick for its application.

(*a*) It is now clearly enough recognized that each case presents a distinct issue; that each case must be determined by the facts relevant to it; that we are dealing, in truth, not with a question of law but the application of an undisputed formula to a constantly changing and growing variety of economic and social facts.[55] Each

[53] Commonwealth *v.* Boston & M. R. R., 110 N. E. (Mass.) 264 (1915).

[54] Lochner *v.* New York, 198 U. S. 45 (1905).

[55] See People *v.* Schweinler Press, 214 N. Y. 395, 411–412, 108 N. E. 639, 643 (1915); Bosley *v.* McLaughlin, 236 U. S. 385, 392 *et seq.* (1915); Miller *v.* Wilson, 236 U. S. 373, 382 (1915); McLean *v.* Arkansas, 211 U. S. 539, 549–550 (1908).

case, therefore, calls for a new and distinct consideration, not only of the general facts of industry but the specific facts in regard to the employment in question and the specific exigencies which called for the specific statute.

(*b*) The groundwork of the Lochner case has by this time been cut from under. The majority opinion was based upon "a common understanding" as to the effect of work in bakeshops upon the public and upon those engaged in it. "Common understanding" has ceased to be the reliance in matters calling for essentially scientific determination. "Has not the progress of sanitary science shown," Professor Freund pertinently inquires, "that common understanding is often equivalent to popular ignorance and fallacy?" [56] On the particular issue involved in the Lochner case "study of the facts has shown that the legislature was right and the court was wrong." [57] Either because matters as to which the court of its own knowledge cannot know, or, because not knowing, it cannot assume the non-existence of facts, contested legislative action should be resolved in favor of rationality rather than capricious oppression. Happily the fundamental constitutional doctrine of the assumption of rightness of legislative conduct, where the court is uninformed, is again rigorously being enforced by the United States Supreme Court.[58]

(*c*) So far as the general flavor of the Lochner opinion goes, it surely is no longer "controlling." If the body of professional opinion counts for anything in the appraisal of authority of a decision, (itself decided by a divided court, and since departed from in effect

---

[56] 17 GREEN BAG 411, 416.

[57] Professor Roscoe Pound, "Liberty of Contract," 18 YALE L. J. 454, 480, and n. 123.

[58] Thus, in one of its latest opinions, the Supreme Court refused to upset a "police measure" with the following language:

"Petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination and upon which nevertheless we are expected to reverse legislative action. . . ." Hadacheck *v.* Sebastian, 239 U. S. 394, 413 (Dec. 20, 1915).

Here, as elsewhere in the law, Mr. Justice Holmes long ago put the matter with acute finality: "I cannot pronounce the legislation [prohibiting fines against weavers for defective workmanship] void, as based on a false assumption, since I know nothing about the matter one way or the other." Commonwealth *v.* Perry, 155 Mass. 117, 124–125, 28 N. E. 1126, 1127 (1891). As to the reasonableness of the legislature's belief that a system of fines affords dangerous temptations for oppressive use see R. H. TAWNEY, MINIMUM RATES IN THE TAILORING INDUSTRY, pp. 60 and 95.

in an important series of cases), it has been impressively arrayed against this decision. If ever an opinion has been subjected to the weightiest professional criticism it is the opinion in the Lochner case. Judge Andrew Bruce, Professor Ernst Freund, Judge Learned Hand, Professor Roscoe Pound — to mention no others — surely speak with high competence upon this subject. Nevertheless, the body of persuasive authority which their writings present was not brought to the court's attention and failed to be considered in the disposition of the case.[59]

The circumstances which resulted in this decision reveal anew a situation of far-reaching importance. For it affects the very bases on which constitutional decisions are reached and, therefore, affects vitally the most sensitive point of contact between the courts and the people. The statute under discussion may well have been of no particular social import. The decision which nullified it, one may be sure, offers no intrinsic obstruction to needed legislation, and in itself has merely ephemeral vitality. But, unfortunately, the evil that decisions do lives after them. Such a decision deeply impairs that public confidence upon which the healthy exercise of judicial power must rest.

Under the present-day stress of judicial work it is inevitable that courts, on the whole, can only decide specific cases as presented to them.[60] In other words, the substantial dependence upon the facts and briefs presented by counsel throws the decision of the courts largely upon those chances which determine the selection of counsel. These are, of course, necessary human draw-

[59] A. A. Bruce, "The Illinois Ten Hour Labor Law for Women," 8 MICH. L. REV. 1; G. S. Corwin, "The Supreme Court and the Fourteenth Amendment," 7 MICH. L. REV. 643; Ernst Freund, "Limitation of Hours of Labor and the Federal Supreme Court," 17 GREEN BAG 411, "Constitutional Limitations and Labor Legislation," 4 ILL. L. REV. 609; L. N. Greeley, "The Changing Attitude of the Courts toward Social Legislation," 5 ILL. L. REV. 222; Learned Hand, "Due Process of Law and the Eight Hour Day," 21 HARV. L. REV. 495; Sir Frederick Pollock, "The New York Labor Law and the Fourteenth Amendment," 21 L. QUART. REV. 211; Roscoe Pound, "Liberty of Contract," 18 YALE L. J. 480. *Cf.* Mr. Wigmore's comment on "The Qualities of Current Judicial Decisions," 9 ILL. L. REV. 529, 530–1.

But see Atkins *v.* Grey Eagle Coal Co., 84 S. E. 906 (1915), where the Court of Appeals of West Virginia sustained a truck act, in effect overruling the decision in State *v.* Goodwill, 33 W. Va. 179 (1889), and cited among its authorities Professor Pound's article, "Liberty of Contract," 18 YALE, L. J. 480.

[60] See Mr. Justice Swayze in "The Growing Law," 20 YALE, L. J. 1, 18–19. People *v.* Schweinler Press, 214 N. Y. 395, 411, 108 N. E. 639, 643 (1915).

backs, and the practice works out well enough in controversies where purely individual interests are represented by counsel. This is not the situation in cases such as the one before the Massachusetts court. The issue submitted to the court in fact was the issue as determined by the District Attorney of Worcester and counsel for the Boston and Maine Railroad. In truth, the issue was between the Court and the Legislature. In such a case either the legislative judgment should be sustained if there is "no means of judicial determination" that the legislature is indisputably wrong,[61] or the court should demand that the legislative judgment be supported by available proof.[62] It would seem clear that courts have inherent power to accomplish this by indicating the kind of argument needed to reach a just result; or even by calling for argument from members of the bar — officers of the court — of particular equipment to assist in a given problem.[63] If legislation be necessary New York furnishes an example in its recent enactment authorizing the courts to request the attendance of the attorney general in support of an act of the legislature when its constitutionality is brought into question.[64]

These, after all, are only expedients. Fundamental is the need that the profession realize the true nature of the issues involved in these constitutional questions and the limited scope of the reviewing power of the courts.[65] With the recognition that these questions raise, substantially, disputed questions of fact must come the invention of some machinery by which knowledge of the facts, which are the foundation of the legal judgment, may be at the service of the courts as a regular form of the judicial process. This need has been voiced alike by jurists and judges.[66] Once

[61] Hadacheck *v.* Sebastian, 239 U. S. 394, 413 (1915). Price *v.* Illinois, 238 U. S. 446, 452 (1915).

[62] Professor Ernst Freund, "Constitutional Limitations and Labor Legislation," 4 ILL. L. Rev. 609, 622.

[63] It is interesting to note that the chief arguments in the series of cases beginning with the Muller case were made by an *amicus curiae*, Mr. Louis D. Brandeis, in behalf of the National Consumers' League.

[64] NEW YORK LAWS, 1913, ch. 442, p. 919.

[65] See 28 HARV. L. REV. 790.

[66] Professor Roscoe Pound, in "Legislation as a Social Function," 7 Pub. Am. Soc. Soc'y, 148, 161: "In the immediate past the social facts required for the exercise of the judicial function of law-making have been arrived at by means which may fairly be called mechanical. It is not one of the least problems of the sociological jurist to discover a rational mode of advising the court of facts of which it is supposed

the need shall be felt as the common longing of the profession the inventive powers of our law will find the means for its satisfaction.

Felix Frankfurter.

HARVARD LAW SCHOOL.

---

to take judicial notice." So (in dealing with a somewhat similar problem) Judge Learned Hand, in Parke Davis & Co. *v.* Mulford & Co., 189 Fed. 95, 115: "How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance." *Cf.* also, Steenerson *v.* Great Northern Ry., 69 Minn. 353, 377, 72 N. W. 713, 716 (1897).